YATES ENERGY CORP.

IBLA 85-367 Decided October 4, 1985

Appeal from a decision of the New Mexico State Office, Bureau of Land Management, affirming assessments for failure to comply with regulations governing seals on oil storage tank valves. NM 15015.

Affirmed.

1. Bureau of Land Management--Oil and Gas Leases: Civil Assessments and Penalties

When the Bureau of Land Management cites an oil and gas lessee for an incident of noncompliance with regulatory requirements, i.e., the failure to effectively seal a valve, the applicable regulation, 43 CFR 3163.3, requires that the Bureau of Land Management levy an assessment in the amount provided by the regulation.

APPEARANCES: Fred G. Yates, president, Yates Energy Corporation.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Yates Energy Corporation has appealed a decision dated January 28, 1985, of the New Mexico State Office, Bureau of Land Management (BLM), affirming two Incident of Noncompliance (INC) citations, dated January 11, 1985, and the resulting assessments of $250 for each INC. The reasons for issuance, as stated in the INC's, are as follows: "Your tank No. 111304 [and 111305] is not effectively sealed at the load valve. You shall effectively seal the valve as in 43 CFR 3162.7-4(1), Site Security." The date of the INC for tank No. 111305 is listed as January 11, 1985, and the date of the INC for tank No. 111304 is mistakenly dated January 11, 1984. The correct date for both is January 11, 1985.

Corrective action taken for tank No. 111304, is stated in the INC as "Back (next to tank) 2nd seal was broken off below slot. Replaced with new post and slot tab and sealed above locking handle." For tank No. 111305, the corrective action taken was described as: "Back seal clip post was intact, but pushed down under locking handle. Stood up and handle placed over it, tab put in place and sealed." In both instances the corrective action was to be taken within 5 days from the day of receipt of the INC. All necessary action was taken within the required period.

The INC's state that "[f]ailure to correct this violation within the prescribed time will result in an additional assessment of $250 per 43 CFR 3163.3(a). YOU MAY ALSO BE SUBJECT TO CIVIL PENALTIES UNDER THE FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982 [(FOGRMA)]."

The record discloses no civil penalty was imposed by BLM pursuant to FOGRMA, 30 U.S.C. § 1709 (1982).

The regulation which was violated by lessee, 43 CFR 3162.7-4(b)(1), provides:

> All appropriate valves on lines entering or leaving oil storage tanks shall be effectively sealed during the production phase and during the sales phase. The piping and connections in a closed system which are tamper proof or tamper resistant are essentially protected from unauthorized or undocumented entry, but the piping and connections in an open system shall be protected.

The regulation providing for the levy of an assessment for a violation, 43 CFR 3163.3, provides in pertinent part:

> Certain instances of noncompliance result in loss or damage to the lessor, the amount of which is difficult or impracticable to ascertain. Except where actual losses or damages can be ascertained in an amount larger than that set forth below, the following amounts shall be deemed to cover loss or damage to the lessor from specific instances of noncompliance.
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> * * * * *
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> (j) For failure to maintain effective seals required by the regulations in this part and by applicable orders and notices, or for failure to maintain the integrity of any seal placed upon any property or equipment by the authorized officer, $250.

See Farmers Union Central Exchange, Inc., 87 IBLA 332, 92 I.D. 281 (1985).

In the statement of reasons for appeal, appellant characterizes the assessments as "punative [sic] and criminal in nature, and therefore contrary to law." Specifically, appellant states:

> The penalty assessment of $250.00 cannot stand either as a penalty or as liquidated damages. In either case, the penalty is contrary to law. Liquidated damages can only be assessed when there are actual damages which can be measured. Legal counsel advises that BLM's rights, with the regulations incorporated, must be determined by the same rules of law which govern the construction of contracts between individuals. It is well established in law that liquidated damages must be reasonable in light

> of the actual or anticipated loss caused by the breach of contract. The loss to BLM is zero or at most de minimis, so the fines are punative [sic] in nature and bear no relation to any actual loss to BLM due to acts or ommissions [sic] which result in unintentional non-compliance.

Appellant further states that "[s]ales valves are sealed by the transporter, and it is the responsibility of the transporter to seal the valves with one seal or two seals as required to be effective." Appellant contends "[i]t is totally unreasonable and inequitable to hold the operator responsible for the actions of the first purchaser."

Appellant states:

> The Act, at Section 109 [presumably of the Federal Oil and Gas Royalty Management Act], calls for civil penalties, but only after notice to an operator and after the operator refuses to correct the violation. In this case, there was no opportunity to correct the violation. Since the law requires notice before a penalty can be assessed, any regulations providing for penalties without notice must be unenforceable. In fact, it appears from the face of the INCs that the violation was virtually corrected on the spot, yet a fine was levied.

[1] Appellant does not question the circumstances which gave rise to issuance of the INC's and we need not consider whether BLM properly concluded that the valves were unsealed. This leaves us only to consider whether it was proper to levy an assessment.

When examining appellant's assertions regarding the penal nature of the assessments, we find the intent of the Secretary when adopting the applicable regulation to be helpful. The supplemental information for the regulation, 43 CFR 3163.3, printed in the Federal Register at the time of its adoption states:

> Two comments suggested that certain of the assessments provided for in this section of the existing regulations are de facto penalties and should either be removed by the final rulemaking or applied under the procedures prescribed by section 109 of the Federal Oil and Gas Royalty Management Act and § 3163.3 of the existing regulations. The final rulemaking does not adopt either of these suggested changes because such assessments do not constitute penalties. While these assessments may appear to be penalties, they are merely compensation to the United States for damages to resources or existing improvements and the added administrative cost to the United States caused by reason of a lessee's failure to comply with the regulations in this part and the resultant need for regulatory action to obtain a correction of the deficiency.

49 FR 37361 (Sept. 21, 1984).

The same Federal Register preamble explained the removal of the provision of 43 CFR 3163.3 which made the assessments applicable to each successive day of noncompliance:

> Since the penalty provisions [43 CFR 3163.4-1] in both the proposed and final rulemakings are imposed for the continued disregard of orders to correct, there is no longer a need to continue assessments during such noncompliance and, therefore, the final rulemaking modifies § 3163.3 to indicate that any assessment for a violation will be a one-time charge.

49 FR 37361 (Sept. 21, 1984).

The regulations mandate an assessment of not less than $250. 1/ As stated in the preamble to the regulations dated September 21, 1984, such an assessment is not a penalty but compensation to the United States. Although good faith or timeliness of compliance may be a consideration as to the penalty provisions of 43 CFR 3163.4-1, neither is a consideration under 43 CFR 3163.3(j).

If appellant is of the opinion that a third party is responsible for the violation it may desire to seek compensation from that party. However, under the terms of its lease, appellant is responsible for the maintenance of the seals and the assessment was properly imposed against it.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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R. W. Mullen
Administrative Judge

We concur:

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Wm. Philip Horton
Chief Administrative Judge

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Will A. Irwin
Administrative Judge

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1/ The assessment regulations were subsequently suspended by notice printed in the Federal Register (50 FR 11517 (Mar. 22, 1985)). However when an appeal is taken from action taken prior to suspension it is proper for this Board to adjudicate the appeal looking to the regulations in effect at the time the assessment was levied. Riviera Drilling and Exploration, 87 IBLA 357 (1985).